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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

995 FIFTH AVENUE ASSOCIATES, L.P.,

Petitioner,

—v.—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES W. WETZLER, As Commissioner of Taxation and Finance; and EDWARD V. REGAN, As Comptroller of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Counsel for Respondents
120 Broadway
New York, New York 10271
(212) 416-8654

JERRY BOONE*
Solicitor General

FREDERIC L. LIEBERMAN
MARCIE S. MINTZ
Assistant Attorneys General

DAVID S. COOK
Senior Attorney

Of Counsel

* Counsel of Record

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Respondents New York State Department of Taxation and Finance, James W. Wetzler, Commissioner of Taxation And Finance, and Edward V. Regan, Comptroller of the State of New York ("respondents"), respectfully submit this brief in opposition to the petition for certiorari.[1] The petition should be

1 Respondents were served with the motion of L.A. Cotton & Co, Inc. and its sole successor in interest, Linda A. Gutterman for leave to file a brief *amicus curiae* on September 25, 1992. Respondents did not consent to the motion for leave to file an *amicus curiae* brief. The motion should be denied for the following reasons: 1) movants' interests are adequately represented by petitioner; 2) the issues raised in the motion were raised by petitioner before the court of appeals, which did not rule on them; and 3) to the extent that these issues are of constitutional dimension, it is not necessary for them to resolved in this case, since the court of appeals correctly decided the issue solely on principles of statutory construction.

denied because it does not present a conflict among the courts of appeals and does not raise an important federal question of national significance which should be settled by this Court.

Statement of the Case

Respondents adopt the statement of the case presented in the opinion of the Court below (3a-4a)[2], as well as in the petition. (2-5).

The court of appeals held that petitioner is not entitled to an exemption from the Tax on Gains Derived From Certain Real Property Transfers, New York Tax Law § 1440 *et seq.* (McKinney 1987), as amended, ("gains tax") because the gains tax is not a stamp or similar tax within the meaning of 11 U.S.C. § 1146(c).[3] The court thus reversed the order of the district court insofar as it directed New York to refund gains tax paid by petitioner. (21a).

In reaching this conclusion, the court analyzed the types of taxes from which Congress intended to exempt qualifying debtors when it enacted 11 U.S.C. § 1146(c), and stated that, since "[t]he Bankruptcy Code supplies no definitions for the terms 'stamp tax' or 'similar tax' . . . we must look to the legislative history for assistance in determining what Congress meant by the phrase 'stamp tax or similar tax.' (12a). The court concluded that ". . . [a]lthough the legislative history shows that the scope of the § 1146(c) tax exemption has expanded since its original enactment in 1934, it fails to indicate whether the New York gains tax qualifies as a 'stamp tax or similar tax'." (14a). The court thus interpreted the words used by

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2 References to the Petition and the Appendix are cited as (" ") and ("___a"), respectively.

3 Bankruptcy Code § 1146(c), 11 U.S.C. § 1146(c) provides:

§ 1146. Special Tax provisions.

(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

Congress, "stamp tax or similar tax" in accordance with "their ordinary, contemporary, common meaning." (*Id.*) (Citations omitted.)

Analysis of the ordinary and common meaning of a stamp or similar tax indicates that there are five essential elements present in those taxes:

> (1) they are imposed only at the time of transfer or sale of the item at issue; (2) the amount due is determined by the consideration for, par value of, or value of the item being transferred; (3) the tax rate is a relatively small percentage of the consideration, par value or value of the property; (4) the tax is imposed irrespective of whether the transferor enjoyed a gain or suffered a loss on the underlying sale or transfer; and (5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording. (18a).

The court of appeals found that there were at least "three important differences between the New York gains tax and stamp and documentary transfer taxes"—the gains tax liability is always contingent on the profitability of the underlying transaction; the consideration for the sale is not determinative of the amount; and the tax rate provided in the New York Tax Law, ten percent of the gain, greatly exceeds the tax rate used in any stamp tax or documentary transfer tax. The court thus concluded that although the gains tax bears some resemblance to stamp or similar taxes, it is not a stamp or similar tax within the meaning of 11 U.S.C. § 1146(c). (20a).

REASONS FOR DENYING THE WRIT

The question presented in the petition is whether under section 1146(c) of the Bankruptcy Code the New York State gains tax is a "stamp or similar tax" from which a Chapter 11 debtor is exempt. (i). Petitioner does not assert a conflict among the circuits as to this issue, because there is none. Nor, as petitioner claims, is there a real conflict between the court of

appeals and the "approach taken by courts across the nation." (5). The issues raised in "the courts across the nation" addressed 1) whether the stamp or similar tax can be imposed on the purchaser or transferee, *see CCA Partnership v. Director of Revenue*, (*In re CCA Partnership*), 70 B.R. 696 (Bankr. D. Del.), *aff'd*, 72 B.R. 765 (D. Del.), *aff'd*, 883 F.2d 303 (3d Cir. 1987), *In re Cantrup*, 53 B.R. 104 (Bankr. D. Col. 1985); 2) whether a sale was under a confirmed plan, *see In re Permar Provisions, Inc*, 79 B.R. 530 (Bankr. E.D.N.Y. 1987); 3) whether the § 1146(c) exemption applies to plans of liquidation as well as reorganization, *see City of New York v. Smoss Enterprises Corp.* (*In re Smoss Enterprises Corp.*), 54 B.R. 950 (E.D.N.Y. 1985); or 4) whether the § 1146(c) exemption applies to a convertible mortgage, *see City of New York v. Baldwin League of Independent Schools* (*In re Baldwin League of Independent Schools*), 110 B.R. 125 (S.D.N.Y. 1990). No case even analyzed the issue presented here, much less reached a different result.

Petitioner also asserts that the interpretation of the § 1146(c) exemption by the court of appeals in this matter conflicts with, even "reverses" (5) that court's prior decision in *City of New York v. Jacoby-Bender, Inc.* (*In re Jacoby-Bender, Inc.*), 758 F.2d 840 (2d Cir. 1985). Even assuming that a split within a circuit were a basis for a grant of certiorari, *but see Davis v. United States*, 417 U.S. 333, 340 (1974), there is no split in the Second Circuit. The issue before the court of appeals in *Jacoby-Bender* was not the application of the exemption to the gains tax, but the applicability of section 1146(c) to a transfer that was arguably not a transfer under a chapter 11 plan. Although the court referred to the expansion of the stamp tax exemption to include state taxes, similar taxes and to apply to a broader class of debtors, 758 F.2d at 841-42, it clearly did not interpret the most recent statutory expression of the exemption, § 1146(c), as altering the nature of the tax relief in the original statute. Thus, the Court's decision in this case is consistent with *Jacoby-Bender*, not a reversal of it.[4]

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4 Petitioner is also incorrect in viewing the court of appeals' decision as a narrowing of the § 1146(c) exemption. (5). As the court of appeals stated, Section 1146(c) does not accord greater tax relief to debtors than

Petitioner's attempt to raise the question presented to one of national importance is unavailing. (12, 13). It is indisputable that only New York has a tax such as the gains tax. The possibility that other jurisdictions might enact an identical tax is pure speculation. Similarly, the prospect of further challenges by state and local governments to the section 1146(c) exemption does not make the issue worthy of review by this Court.

Although, large sums of money are at stake in this case, and the decision of the court of appeals may have an economic impact beyond the borders of New York, most, if not all of the Chapter 11 cases in which the applicability of the § 1146(c) exemption to the Gains Tax will arise, will be venued in bankruptcy courts sitting within the boundaries of the Second Circuit and bound to follow the court of appeals' decision. Because the Gains Tax is imposed only on transfers of real property within New York, even bankruptcy courts sitting outside New York (which occasionally dispose of property within New York) would be bound by *lex loci situ* to follow the court

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was formerly available. (13a, n.2). The court carefully traced the legislative history of both section 1146(c) and its predecessor, section 77B of the Bankruptcy Act of 1898 ("the Bankruptcy Act"), as amended [11 U.S.C. § 267 (repealed)], to show that the original exemption was first expanded to include state as well as federal stamp taxes and later to include taxes similar to stamp taxes. (*Id.*) Additionally, in the context of the goals of the Bankruptcy Reform Act of 1978, Public Law 95-598, 92 Stat. 2549 ("the Bankruptcy Code"), including removal of outdated restrictions on eligibility for bankruptcy relief, the language of section 1146(c) also reflects an extension of the exemption to a new class of debtors. *In re Jacoby-Bender*, *supra*. The former section 267 exemption had been available only to debtors who filed under former chapter X of the Bankruptcy Act. The new "consolidated" Chapter 11 of the Bankruptcy Code combined the bankruptcy relief available under former chapters X and XI, and Section 109 of the Bankruptcy Code, 11 U.S.C. § 109, removed the differing restrictions on eligibility for relief under each former chapter. Thus Section 1146(c) now extends the stamp tax exemption to debtors who would previously have qualified only for relief under former Chapter XI, and so would not have been entitled to the former section 267 exemption. Neither a wider nomenclature of exempted taxes nor a broader class of debtors eligible to claim the exemption is equivalent to changing the nature of the tax relief originally enacted.

of appeals' decision. Thus, although the petition raises a federal question, it is one of local, not national importance.

Petitioner also asserts that in rendering its decision, the court of appeals "simply ignored basic rules of statutory construction in interpreting the language of § 1146(c)." (6). In essence, however, petitioner disagrees only as to the relative importance of both the common and distinguishing characteristics between the court's definition of a stamp tax and the gains tax. The petition does not challenge the court's definition of the characteristics of a stamp tax.

For example, petitioner argues that it was misleading for the court of appeals to focus *only* on the tax rate. (9). This argument is belied by the decision below. The tax rate was only one of five factors considered by the court in determining whether the gains tax was a "stamp or similar tax."

Petitioner also argues that the court's determination that another characteristic of a "stamp or similar tax" is that the tax is determined solely by multiplying the tax rate by "either the par value of the security, the consideration in the deed, or the value of the property that is the subject of the transaction" overlooks examples of stamp or similar taxes which are not calculated in that way. (17a) (10). Petitioner cites as an example, the New York Real Estate Transfer Tax ("RETT"), New York Tax Law § 1402, (McKinney 1987, Supp. 1992), which the court of appeals described as a stamp or similar tax. (16a). Petitioner points out that the RETT provides that the value of a continuing lien is excluded from the consideration, and thus concludes that the multiplicand, *i.e.*, the number by which the tax rate is multiplied, is "neither the consideration, the value of the property being transferred, nor par value." (10). This conclusion is flatly contradicted by the RETT statute (Tax Law § 1402) which defines the consideration to be taxed. The stamp tax statutes of other States cited by petitioner (10, 11) similarly define the consideration to be taxed. Thus, there is no possibility of the nation-wide confusion imagined by petitioner. (11).

Petitioner challenges as "unsubstantiated" the court of appeals' holding that the gains tax is imposed on gains, while stamp or similar taxes arise "solely from the act of transferring property or securities", because, it argues, the gains tax is imposed "even when a seller suffers a loss." (*Id.*)

In fact, the court of appeals explicitly recognized that the gain that is taxed is not the same gain that an accountant or an economist would recognize: "The fact that 'gains', *as calculated under the gains tax*, does not take into account certain development costs in no way alters this core attribute of the gains tax (19a)" * * * "It is the gain, *albeit as defined by the provisions of the gains tax*, that provides the key figure for determination of the amount owed under the tax." (20a). (Emphasis added.)[5]

Petitioner suggests that the "facts of this case" show that the gains tax is imposed on transfers in which there is economic loss incurred. (12). It bases this statement on the fact that creditors' claims are larger than the amount available for distribution. However, there is no causal connection between the amount of money realized on the transfer of petitioner's real property (determined by market forces), part of which was a taxable gain, and the size of the claims of its creditors. Thus, the purported loss in this case was not a loss on the lone taxed transfer, but an overall loss resulting from all of petitioner's operations.[6] The court of appeals thus correctly ruled that the

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5 Thus, petitioner's citation to the joint report of the New York State Bar Association Tax Section of the City of New York Committee on State and Local Taxation (11-12) should be disregarded. In the first place, it is not part of the record of this case. More importantly, it is irrelevant, because it does not substantiate petitioner's statement that the gains tax is imposed "when the seller suffers a loss." (11). Nowhere in the report, or, for that matter, in the statute or the regulations promulgated to enforce it is there any mention of the gains tax being imposed when there is no gain, as gain is statutorily defined.

6 Also, the implication that the claims of the Resolution Trust Corporation and the Federal Deposit Insurance Corporation are entitled to more favorable treatment than taxes (12) is contrary to the priority established by Congress in the Bankruptcy Code. In any bankruptcy case the amount available for distribution to creditors is always subject to the

gains tax is not a "stamp or similar tax" within the meaning of § 1146(c).

Petitioner attempts to couch its claim as one of constitutional dimension, by alleging that the doctrine of intergovernmental tax immunity forbids properties in bankruptcy from receiving less favorable tax treatment than properties subject to foreclosure sale. (13-17). This question, however, is not properly presented.[7] Petitioner did not raise this claim in any of the courts below, either in its Amended Complaint, its motion for summary judgment, or on appeal, and therefore, the court of appeals did not address the claim. Absent extraordinary circumstances not present here, an issue may not be raised for the first time in a petition for certiorari. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); Stern, Gressman & Shapiro, *Supreme Court Practice* at 364 (6th ed. 1986).[8]

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statutory first priority accorded to administrative expenses such as taxes. 11 U.S.C. §§ 503, 507. Moreover, section 1146(c), which, if applied to the gains tax, might result in such more favorable treatment for these and other creditors, contains no provision for the exercise of the Bankruptcy Court's equitable powers so as to apply the exemption or not, depending on the facts of a particular case.

7 Although this issue was presented below by Sanwa Bank, (15) which moved in the court of appeals for leave to file a brief, *amicus curiae*, in support of petitioner's petition for rehearing, the court of appeals denied *sub silentio* Sanwa's motion to file its brief. The court also denied the petition for rehearing. (98-99a).

8 In any event, petitioner lacks standing to make the argument, since, as it concedes, neither petitioner, nor any other Chapter 11 debtor would have to pay the gains tax under Sanwa Bank's allegedly discriminatory scenario. (15-16).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
September 28, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8654

JERRY BOONE*
Solicitor General

FREDERIC L. LIEBERMAN
MARCIE S. MINTZ
Assistant Attorneys General

DAVID S. COOK
Senior Attorney
Of Counsel

* Counsel of Record